West Virginia State Tax Department

Publication TSD-390
(Rev. December 2007)

SECTION 11-21-71a Income Tax Withholding By Partnerships, S Corporations, Estates And Trusts

If you are a PARTNERSHIP, S CORPORATION, ESTATE or TRUST which has distributable net income from West Virginia sources that is includible in the federal adjusted gross income of a nonresident individual or corporation, this publication should be of interest to you.

This publication is intended to provide basic information regarding compliance with the withholding requirements imposed by W. Va. Code § 11-21-71a. A second publication, TSD-391 provides additional information on this subject. TSD-391 may be obtained by calling the Department's automated form ordering system at (304) 344-2068, or toll-free within West Virginia at 1-800-422-2075.

Partnerships, S corporations, estates and trusts doing business in West Virginia or deriving income from real or tangible personal property located in West Virginia are required to withhold West Virginia income taxes from distributions, whether actual or deemed, of taxable West Virginia source income to partners, shareholders or beneficiaries who are not residents of West Virginia.

Withholding is required for taxable years of partnerships, S corporations, estates and trusts which begin after December 31, 1991. The amount of withholding tax payable is four percent (4%) of a pass-through entity's effectively connected taxable income, which may be lawfully taxed by West Virginia, and which is allocable to a nonresident distributee. For taxable years beginning on or after January 1, 2008, the rate of tax to be withheld shall be equal to 6.5%.

"Effectively connected taxable income" means: "the taxable income or portion thereof of a ... [pass-through entity] which is derived from or attributable to West Virginia sources as determined under ... [11-21-32] and such regulations as the tax commissioner may prescribe, whether such amount is actually distributed or is deemed to have been distributed for federal income tax purposes." W. Va. Code § 11-21-71a(e). When determining the amount due, the pass-through entity may apply any tax credits allowable, under chapter 11 of the West Virginia Code, to the pass-through entity which pass-through to nonresident distributees. In no event, however, may application of these credits reduce the tax liability to less than zero.

Withholding is required except:

Tax exempt corporate distributee. — On distributions to a corporation which is exempt from paying West Virginia corporation net income tax. A corporation is exempt only if the corporation is, by reason of its purpose or activities, exempt from paying Federal income taxes on the corporation's West Virginia source income.

Tax exempt noncorporate distributee. — On distributions to any other person who is exempt from paying West Virginia personal income tax. A person is exempt only if such person is, by reason of such person's purpose or activities, exempt from paying Federal income taxes on such person's West Virginia source income.

Undue hardship. — See Publication TSD-391.

761 nonpartnership ventures. — On distributions by an unincorporated organization which has elected, under I.R.C. § 761, to not be treated as a partnership for Federal income tax purposes. However, a nonpartnership venture is required to report: (1) the amount of fixed or determinable gains, profits and income of the unincorporated organization, and (2) the name, address and taxpayer identification numbers of persons receiving fixed or determinable gains, profits or income from the venture.

Distributee tax payment agreement. — On distributions to a nonresident distributee who executed and timely filed with the pass-through entity a West Virginia Nonresident Income Tax Agreement, Form WV/NRW-4, that has not been revoked either by the maker or the Tax Commissioner.

Withholding tax due from the pass-through entity must be paid no later than:

S Corporations. — The fifteenth day of the third month following the close of the taxable year of the S corporation with the annual information return, Form WV/CNT-112S, due under West Virginia Corporation Net Income Tax Act unless, and then only to the extent, a composite West Virginia personal income tax return is filed for such nonresident individuals under § 11-21-51a.

Partnerships, Estates and Trusts. — The fifteenth day of the fourth month following the close of the taxable year of the partnership, estate or trust, with the annual return of the partnership, Form IT-165, or of the estate or trust, Form IT-141, due under the West Virginia Personal Income Tax Act unless, and then only to the extent, a composite West Virginia personal income tax return is filed for such nonresidents individuals under § 11-21-51a.

A composite WVPIT return and the amount of tax due for the year are due on the fifteenth day of the fourth month after the close of the taxable year of the nonresident individuals included in the composite return, along with a $50 filing fee.

An extension of time to file any of the above-referenced returns does not extend the time for paying the amount of withholding tax due, or the amount of tax due with a composite return filed under § 11-21-51a.

When a pass-through entity is allowed an extension of time to file its Federal return, the pass-through entity is automatically allowed a like extension of time to file its West Virginia return, Form IT-141, IT-165, or WV/CNT-112S, as the case may be. However, at least ninety percent (90%) of the withholding tax due for the taxable year, or one hundred percent (100%) of the tax paid under § 11-21-71a for the prior taxable year, if such taxable year was a taxable year of twelve months and tax was paid under § 11-21-71a for that taxable year, must be paid on or before the unextended statutory due date of the West Virginia return. Remittance must be attached to Form WV/NRW-1, Extension Of Time To File Information Returns, and mailed to: Department of Tax and Revenue, Internal Auditing Division-PITPU, P.O. Box 2585, Charleston, West Virginia 25329-2585.

The remaining balance of tax due, if any, must be paid at the time the pass-through entity files its Form IT-141, IT-165, or WV/CNT-112S, as the case may be, for the taxable year, or the composite return is filed under § 11-21-51a. If such balance is paid by the last day of the extension period for filing such return and the amount of tax due with such return is ten percent (10%) or less of the tax due under § 11-21-71a for the taxable year, no additions to tax will be imposed under W. Va. Code § 11-10-18 with respect to the balance so remitted.

A pass-through entity which fails to deduct and withhold tax as provided in § 11-21-71a is liable for payment of the amount of tax due under that section.

West Virginia State Tax Department
Taxpayer Services Division
P. O. Box 3784
Charleston, West Virginia 25337-3784
Telephone: (304) 558-3333
Toll free : 1-800-WVA-TAXS (1-800-982-8297)
or visit our web site:
http://www.state.wv.us/taxdiv
TDD service for the hearing impaired: 1-800-2TAXTDD (1-800-282-9833)